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IN THE

Supreme Court of the United States

October Term, 1956

No. 216

NUODEX PRODUCTS CO., INC.,

Petitioner,

vs.

W. H. ELLIOTT & SONS, CO., INC., and
E. & F. KING & CO. INCORPORATED,

Respondents.

Respondent Elliott's Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent W. H. Elliott & Sons Co., Inc., prays that the writ of certiorari herein sought by petitioner, Nuodex Products Co., Inc., be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported in 243 F. 2d. 116, and reverses the decision of the Federal District Court for the District of New Hampshire, reported in 144 F. Supp. 401.

JURISDICTION

The decision of the Court of Appeals for the First Circuit was entered March 26, 1957. Review by certiorari is permissible under 28 U. S. C. 1254(1). Petition for writ of certiorari was timely filed on June 22, 1957.

QUESTION PRESENTED

1. Whether the Federal District Court for the District of New Hampshire acquired jurisdiction over a foreign corporation served in accordance with local statute, where the foreign corporation promoted the use of its products in New Hampshire by a sales force, advertising, and service to regular customer accounts over the years; registered the particular product alleged to have caused the damage complained of, as an economic poison under New Hampshire Economic Poisons Law, to make its sale within the state lawful; and solicited sales within the state by a continuous systematic course of business activity in New Hampshire through an independent corporate sales agent; on a complaint seeking to recover the damages caused in New Hampshire to a New Hampshire resident who bought in New Hampshire for use in New Hampshire paint in which the poisonous product had been incorporated by a co-defendant in Massachusetts. The District Court found that the foreign corporation was doing business in the state and that no undue inconvenience would be occasioned to it in defending the suit in the state; but concluded that the Court lacked jurisdiction because the cause was not related to its local activities; the Court of Appeals reversed on the basis that if a relation was necessary, the cause was related to the foreign corporation's activities within the state.

STATEMENT OF THE CASE

This is a diversity complaint against two foreign corporations, seeking to recover damages allegedly sustained when plaintiff Elliott painted commercial rose-growing greenhouses with defendant King's greenhouse paint, in which King had incorpora-

ted Nuodex' mildew inhibitor, "Super-Ad-It". The Nuodex product, "Super-Ad-It", is a mercury compound which vaporizes; roses are susceptible to mercury vapors, and $800,000 damage to the roses is alleged to have resulted.

King, after originally moving to dismiss, waived jurisdiction and filed a cross-complaint against Nuodex. Nuodex moved to dismiss (1) because the complaint failed to state a cause against it, and (2) because it was not subject to the jurisdiction of the Court because not doing business in the state.

The District Court, at Nuodex' request, heard the demurrer first, and denied it. Subsequently, at a hearing on the jurisdictional phase of the motion, King having alleged that Nuodex by submitting the demurrer for decision had waived its jurisdictional ground, both King and Elliott relied on this waiver. Elliott and King introduced evidence on the jurisdictional issue which the Court of Appeals considered sufficient to justify the District Court's findings of fact set forth at 243 F. 2d. 116 at 119-120, which include the following:

> "Nuodex is a manufacturer of special-purpose chemicals and has its usual place of business in New Jersey * * * [I]ts sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex Sales Managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company . . . a New York corporation . . . * * *. It is an independant corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per cent commission, and its soliciting personnel are its own employees . . ."

As the District Court considered the matter, its findings were related to the following *"criteria"* (italics added) suggested by this Court in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945):

"*The first criteria* . . . is whether the defendant's activities were systematic and continuous * * * The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to 'sell everything for all companies we represent'" (144 F. Supp. 401 at 405-6, H. N. 6)

* * *

"Once accepting the proposition that solicitation is a commercial activity recognized by New Hampshire as sufficient to constitute 'transacting business' under New Hampshire RSA 300:11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an 'agent' of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In *Labonte* v. *American Mercury Magazine, Inc., supra* [98 N. H. 163, 96 A. 2d. 200, 38 A. L. R. 2d. 742], the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford Press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies besides Nuodex. Rumford Press printed many magazines other than the American Mercury" (144 F. Supp. 401, 406, H. N. 7, 8).

* * *

"*A second criterion* . . . is to estimate the inconvenience 'which would result to the corporation from a trial away from its *home* or principal place of business'. * * * In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here." (144 F. Supp. 401, 406, 407, H. N. 10).

* * *

"*A third criterion* . . . is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. * * * [T]he defendant did take advantage of the provisions of New Hampshire RSA 438:3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the 'exercise of that privilege may give rise to obligations * * *' *International Shoe Co.* v. *State of Washington* . . . . " (144 F. Supp. 401, 407).

After being satisfied that the above three criteria *were* met, the District Court went on:

"*The fourth criterion* . . . is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the State. * * * I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Ad-It because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore I conclude that this fourth 'standard' is not met" (144 F. Supp. 401, 407, H. N. 11, 12).

The District Court, holding that *all four* criteria must be met, dismissed the complaint for failure to meet the fourth criterion or "standard".

On Appeal, the Court of Appeals for the First Circuit reversed the District Court's handling of this "fourth criteria" only, that Court, by Judge Hartigan, stating:

"[W]e believe that such connection is demonstrated by Nuodex' industrial and retail registration of Super Ad-It under the New Hampshire Economic Poison Law, set forth

above, in 1953 and 1954. It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a 'mixture of substances', such as King's paint. See N. H. Rev. Stat. Ann. *c.* 438 *s.* 1 (1955). Therefore the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product, and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen. Thus the damage complained of here 'is accounted for only by the defendant's activities in New Hampshire'. *Taylor* v. *Klenzade Products, supra*, 97 N. H. at page 521 and 92 A. 2d. at page 913."

"Moreover, it is vitally significant that Nuodex did much more than merely register its product in New Hampshire, as detailed in the lower court's decision. The District Court found that there was a continuous and systematic course of business activity in the state by Nuodex through Litter. This activity included efforts to increase the sales of Super Ad-It in New Hampshire. Although the sale that resulted in the damage complained of here was made by Litter to King in Massachusetts, the record in addition reveals that retail packages of Super Ad-It were getting into the state either by direct sales or other distribution routes. All of these various methods of distributing the substance in question were part and parcel of Nuodex' over-all sales program" (243 F. 2d. 116 at 121).

Chief Justice Magruder and Judge Woodbury concurred in separate opinions, both of which considered that New Hampshire did not impose any "criteria" except compliance with Federal due process.

This petition for a writ of certiorari followed.

REASONS FOR DENYING CERTIORARI

If this Court recognizes, as it must, that application of the due

process rule of *International Shoe Co.* v. *Washington*, depends upon weighing the facts presented in each case in relation to the fair and orderly administration of law, it would seem that the questions sought to be raised here by petitioner are so patently frivolous as to make the case a fit candidate for dismissal.

Stripped of its verbosity, the petition urges only that the writ issue here because in other cases on other facts, courts have sometimes sustained complaints under the *International Shoe* case doctrine, and have sometimes dismissed them, indicating that the question of "doing business" is provocative of litigation (Petitioner's Brief *p.* 34). There are other plausible explanations of the frequency of motions to dismiss based upon this defense:

> "Defendants have been known to interpose jurisdictional objections without regard to the amount of hardship upon them, or upon the plaintiff if those objections should prevail." 16 U. Chi. L. R. 523 (1949), The Growth of the International Shoe Doctrine, at 530.

Essentially the facts here are:

(1) The cause arose in New Hampshire.
(2) Plaintiff is a New Hampshire resident.
(3) Both defendants were doing business in New Hampshire.
(4) There is no inconvenience on Nuodex in trying the case in the Federal District Court in New Hampshire.

Nuodex, however, says because it sold so few of its products, over the years, directly to New Hampshire accounts, the fact it was trying to sell, and with some limited success, should be disregarded. No questions are raised, however, except the factual issues involved in weighing the significance of the business done, and the inconvenience, if any, of the forum chosen. We respectfully suggest that on these issues this case is clearly controlled by this Court's decision in *Perkins* v. *Benguet Consol Mining Co.*, 342 U.S. 437, 96 L. Ed. 485 (1952), and was properly decided

below on the holding of that case. The petition should be denied.

If, nevertheless, this Court sees fit to grant the petition, and issue the writ, respondent Elliott respectfully suggests that the only novel holding in the case, and one which would have merited review, had it been decisive, may be stated thus:

> Whether invoking the judgment of a Federal District Court on demurrer to a complaint constitutes a waiver of a claim pleaded but not yet heard, that the District Court lacks jurisdiction over the defendant, where both defenses are raised by a single motion to dismiss. The Court of Appeals affirmed the District Court's ruling that no waiver results.

We firmly believe that both the learned District Court and the Court of Appeals erred in the disposition of this issue (144 F. Supp. 401, at 408; 245 F. 2d. 116 at 117-119, 122). The Court of Appeals while noting that none of the authorities cited by the District Court, or cited by counsel, met the problem, cited no further authority on the point. We know of none. Consequently, we suggest that this is a novel point, and wrongly decided.

Respondent Elliott, however, is not desirous that the writ be granted merely to correct this error, in view of the additional delay which would be imposed in arriving at a decision on the merits. If, on the other hand, the Court sees fit to grant the writ, on the petition of Nuodex, respondent Elliott respectfully requests that the issue on waiver likewise be reviewed.

CONCLUSION

We have indicated above why we believe the writ sought herein should be denied. The decision complained of is based on findings fully supported in the record, and on rulings fully supported by both the *International Shoe* case and the *Benguet Consol. Mining Company* case. If certiorari were granted on the whole case, moreover, we believe the same result would obtain after review, since not only does the record fully support the present

decision on jurisdiction, but, in addition, Nuodex waived its reliance on that defense.

Respectfully submitted,

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